Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1997

FAIR; FIRST ASSEMBLY OF GOD OF VENTURA, JAMES W. WILLIAMS, III; R.H. SMITH FAMILY PARTNERSHIP; LEAVENS RANCHES; ROBERT TOBIAS; STEPHEN TOBIAS; J.D. McGRATH FARMS; HOWARD AND HOWARD RANCH; DANIEL CAMPBELL; ITO FARMS, THE CONTRERAS FAMILY; and HIJI BROS.,

Petitioners,

v.

CITY OF SAN BUENAVENTURA; and the CITY OF SAN BUENAVENTURA CITY COUNCIL,

Respondents.

On Petition For Writ Of Certiorari To The California Court Of Appeal, Second Appellate District After Denial Of Review By The California Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

A. Whether a city ordinance that permits all property owners, except owners of agricultural property, to obtain general plan redesignation of their property by the city council, but requires owners of agricultural property, and only those property owners, to submit the issue of general plan redesignation of their property to the electorate through the initiative process violates the equal protection and due process rights of those property owners.

B. Whether a city ordinance that excludes owners of agricultural property residing outside the city limits but within the city's planning area from voting on the land use designation of their property violates the voting, equal protection, and due process rights of those property owners.

C. Whether a city ordinance that requires a public vote on the use of church land violates the rights of freedom of religion, privacy, equal protection, and due process of law of that church and its members.

PARTIES TO THE PROCEEDING

The parties to this action in the California Court of Appeal, the California Supreme Court and the Ventura County Superior Court were FAIR, First Assembly of God of Ventura, James W. Williams III, James M. Sharp, R. H. Smith Family Partnership, Leavens Ranches, Robert Tobias, Stephen Tobias, J. D. McGrath Farms, Howard and Howard Ranch, Daniel Campbell, Ito Farms, the Contreras family, and Hiji Bros. as plaintiffs and appellants and City of San Buenaventura and the City Council of the City of San Buenaventura as defendants and respondents. There are no parent or subsidiary companies.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

PARTIES TO THE PROCEEDINGS ii

TABLE OF CONTENTS iii

TABLES OF AUTHORITIES CITED v

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 7

ARGUMENT

I. This Court Should Grant the Petition for Writ of Certiorari to Decide If One Class of Property Owners May Be Denied the Right Granted to All Other Property Owners to Change the Land Use Designation of Their Property Without Submitting It to the Electorate 8

Page

A. Measure I Violates Petitioners' Right to Equal Protection and Due Process of Law 8

B. Measure I Violates Petitioners' Voting Rights 11

II. This Court Should Grant the Petition for Writ of Certiorari to Decide if a City May Subject a Church's Teachings to a Popular Vote 15

A. Subjecting a Church's Teachings to a Popular Vote Violates the Church's Rights to Freedom of Religion, Privacy, Equal Protection, and Due Process of Law 15

1. Measure I Denies Church Its Free Exercise of Religion 16

2. Measure I Denies Church Its Right to Privacy 18

3. Measure I Denies Church Equal Protection 20

CONCLUSION 22

TABLE OF AUTHORITIES CITED

Page

Cases

Brown v. Socialist Workers '74 Campaign Committee (Ohio), 459 U.S. 87 (1982) 19

Christian Echoes National Ministry, Inc. v. United States, 470 F.2d 849 (10th Cir. 1972) 21

City of Boerne v. Flores, __ U.S. __, 117 S. Ct. 2157 (1997) 21-22

Collier v. Menzel, 176 Cal. App. 3d 24 (1985) 12

Employment Division, Department of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990) 17

Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) 10

Holt Civic Club v. Tuscaloosa, 439 U.S. 60 (1978) 6,12-13

Hunter v. Erickson, 393 U.S. 385 (1969) 10

Jensen v. Hewlett-Packard Company, 14 Cal. App. 4th 958 (1993) 17

Page

Lucas v. South Carolina Coastal Commission, 505 U.S. 1003 (1992) 11

Moore v. City of East Cleveland, 431 U.S. 494 (1977) 9

Nectow v. City of Cambridge, 277 U.S. 183 (1928) 9

People ex rel. Department of Conservation v. Triplett, 48 Cal. App. 4th 233 (1996) 17

People v. Woody, 61 Cal. 2d 716 (1964) 18

Pillsbury v. Karmgard, 22 Cal. App. 4th 743 (1994) 16-17

Serrano v. Priest, 5 Cal. 3d 584 (1971) 4

State of Wisconsin v. Yoder, 406 U.S. 205 (1972) 21

Thor v. Superior Court, 5 Cal. 4th 725 (1993) 17

Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986) 18

United States Department of Justice v. Reporters Committee for Freedom of the Press 489 U.S. 749 (1989) 18-19

Page

West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943) 17

Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985) 11

Statutes

Cal. Code of Civ. Proc. § 452 4

Cal. Health & Safety Code § 120365 18

§ 123420(a) 18

26 U.S.C. (Internal Revenue Code) § 501(c) 2

§ 501(c)(3) 20-21

§ 501(h) 1,21

§ 501(h)(5) 21

28 U.S.C. § 1257(a) 1

Rules

Supreme Court Rule 10(c) 7

Page

United States Constitution

Amend. I 1

Amend. XIV 1-2,8

Miscellaneous

A. Breckenridge, The Right to Privacy 1 (1970) 19

Warren & Brandeis, The Right to Privacy, 4 Harv. L. Rev. 193 (1890-1891) 19

A. Westin, Privacy and Freedom 7 (1967) 19

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The decision of the California Court of Appeal, Second Appellate District, Division Six, is not reported and is reproduced as Appendix A. Page references are to the version in the Appendix. The opinion of the California Supreme Court denying review is not reported and is reproduced as Appendix B. The opinion of the Ventura County Superior Court is not reported and is reproduced as Appendix C.

JURISDICTION

The decision of the California Court of Appeal was entered June 9, 1997. The decision of the California Supreme Court denying review was entered August 20, 1997. The petition for writ of certiorari has been timely filed in accordance with Rule 13.1 of the Rules of this Court. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The First Amendment to the United States Constitution provides in pertinent part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof ...."

Section 1 of the Fourteenth Amendment to the United States Constitution provides in pertinent part: "No state shall ... deprive any person of life, liberty, or property, without

due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The relevant portions of the Internal Revenue Code, 26 U.S.C. §§ 501(c) and 501(h) are excerpted in Appendix D.

STATEMENT OF THE CASE

On November 7, 1995, the voters of the City of San Buenaventura (City) approved Measure I, an initiative entitled Agricultural Lands Preservation Initiative by a margin of 52% to 48%. Appellants' Appendix in Lieu of Clerk's Transcript (AA) 11. The provisions of Measure I were enacted as Ordinance No. 95-33, effective December 7, 1995. AA 33-39. The initiative measure and enacting ordinance are referred to herein collectively as Measure I.

Measure I purports to enact amendments to the City Comprehensive Plan (Comprehensive Plan) in order to prohibit any land use change or redesignation of any property presently designated "Agricultural Use" under the Comprehensive Plan until December 31, 2030, except pursuant to the very limited exceptions specifically provided for in Measure I. The Comprehensive Plan is the general plan of City. AA 11. Measure I prohibits any change in properties designated "Agricultural Use" unless (1) the change is adopted by a vote of the City's voters or (2) the property is redesignated by the City of San Buenaventura City Council (City Council) under the very limited exceptions and circumstances set forth in Measure I. ***Id.***

The findings that Measure I requires of the City Council in order to redesignate land presently designated "Agricultural Use" are so arbitrarily restrictive that the City Council will not lawfully be able to make such findings. For

example, it would be impossible for the City Council to find that petitioners' property currently designated "Agricultural" ***is proven to be unsuitable for any form of agriculture*** as required by Measure I's Section 1.H. The term "unsuitable for any form of agriculture" is so broad that it excludes every parcel currently designated "Agricultural" from redesignation. Measure I's required findings do not address other proper legislative reasons for changing agricultural uses to other uses on land where such other use is appropriate and further inhibits the City Council from balancing different planning interests as changing circumstances may require. AA 12-13.

Measure I's substantive effect is to prohibit necessary development and thereby deprive property owners, including all petitioners, and local communities from providing necessary urban facilities such as housing, churches, and schools to the community.

Petitioner FAIR (Farmers, Families & Friends Against Irresponsible Regulations) is an unincorporated association of residents and property owners in Ventura County, California. Some members of FAIR are residents of City. Some members of FAIR are residents of unincorporated areas of the County of Ventura (County) that are located outside the City limits but within the area of the Comprehensive Plan Land Use Plan Map of said City. Some members of FAIR reside elsewhere in Ventura County or outside the County. AA 2. Petitioners First Assembly of God of Ventura, James W. Williams, III, R. H. Smith Family Partnership, Leavens Ranches, Robert Tobias, Stephen Tobias, J. D. McGrath Farms, Howard and Howard Ranch, Daniel Campbell, Ito Farms, Contreras family, and Hiji Bros. are individual members of FAIR. AA 3-10.

Petitioners filed their Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief (Complaint) in the Superior Court of Ventura County, California, on March 5, 1996. AA 1. The first cause of action of said complaint alleged, among other things, that Measure I and the amendment to City's general plan enacted thereby violated petitioners' voting rights under the Fourteenth Amendment to the United States Constitution, Complaint ¶ 34. The second cause of action alleged violation of petitioner First Assembly of God's rights of freedom of religion, privacy, equal protection, and due process of law. Complaint ¶¶ 41-42. The third cause of action alleged violation of all petitioners' rights of equal protection and due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution. Complaint ¶ 48, AA 1-31. Respondents filed a demurrer, AA 45, which was sustained without leave to amend[1] on July 31, 1996, AA 483. Judgment was entered on July 31, 1996. AA 487. The trial court ruled as to the first cause of action: "Cities may legitimately restrict participation in municipal elections to city residents. (***Holt Civic Club v. Tuscaloosa*** (1978) 439 U.S. 60, 68-69....) Petitioners have not alleged, and cannot allege, facts with respect to Measure I sufficient to require extending the right to vote in city elections to non-city residents." App. C-3. As to the second cause of action the trial court ruled:

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[1] Under California law, for purposes of testing the sufficiency of a cause of action, a demurrer admits the truth of all material facts properly pleaded. ***Serrano v. Priest***, 5 Cal. 3d 584, 591 (1971). Further, the allegations of the complaint are to be construed liberally with a view to substantial justice between the parties. Cal. Code of Civ. Proc. § 452.

> "First Assembly of God of Ventura ('Church') has failed to allege facts sufficient to show a violation of its rights to equal protection, free exercise of religion, and privacy. Church cannot allege facts sufficient to show a violation of its right to free exercise of religion because Measure I is a 'valid and neutral law of general applicability.' (***See Employment Division v. Smith*** (1990) 494 U.S. 872, 879....) Church has not alleged, and cannot allege, facts showing that, with respect to Measure I, Church has been treated differently than any other landowner subject to the City's General Plan and, thus, it cannot state a claim for violation of its equal protection rights. Finally, Church cannot state facts sufficient to show a violation of its privacy rights because Measure I does not intrude into 'private areas of individual lives.' (***City of Los Altos v. Barnes*** (1992) 3 Cal.App.4th 1193, 2101.)" App. C-3-4.

The trial court ruled as to the third cause of action that petitioners failed to show violation of their equal protection and due process rights. "Planning and zoning routinely impose different requirements upon different categories of land. ***See, e.g., Studen v. Beebe*** (6th Cir. 1978) 588 F.3d 560, 565.) Petitioners have not alleged, and cannot allege, that Measure I's special treatment of agricultural land within its planning area is irrational or fails to advance a legitimate governmental interest. (***See, Kawaoka v. City of Arroyo Grande*** (9th Cir. 1994) 17 F.3d 1227, 1234.)" App. C-4.

On appeal, petitioners raised the issue of the denial of their right to vote as an infringement of their Fourteenth Amendment due process and equal protection rights in their

opening brief at 6-16. The California Court of Appeal rejected petitioners' argument, quoting ***Holt Civic Club v. Tuscaloosa***, 439 U.S. 60, 68-69 (1978), for the principle that "'a government unit may legitimately restrict the right to participate in its political process to those who reside within its borders.'" App. A-6.

Petitioner Church raised the issue of denial of free exercise of religion under the First Amendment to the United States Constitution, denial of the right of privacy and denial of equal protection of the laws in its opening brief on appeal at 16-30. The Court of Appeal rejected these argument holding that the Church's

> "allegation that Measure I subjects the Church's teachings to popular referendum is not an allegation of fact but a conclusion born of pure speculation. ... The allegation is belied by the terms of Measure I. The measure calls for nothing other than a vote on a land use designation. It does not call for a vote on anyone's religious beliefs. It does not infringe in any respect on the free exercise of the Church's religion." App. A-9.

As to the right of privacy, the court held: "The contention is based on the theory that Measure I puts the Church's religious beliefs to a popular vote. The theory is without foundation. Nor does Measure I compel the Church to engage in any political activity. The decision whether to pursue a change in the land use designation is entirely up to the Church." App. A-10. The court also rejected Church's equal protection argument, holding: "But the Church cites no authority that requires a city to formulate land use planning policies with an eye toward the tax status of individual landowners. If the Church believes the tax laws

leave it at a disadvantage, its argument is with the tax laws, not Measure I." App. A-11.

Petitioners raised their due process and equal protection arguments on appeal in their opening brief at 30-34. The Court of Appeal rejected these arguments, stating: "Thus, it is reasonable to single out agricultural land for special treatment that makes it more difficult to change its classification. Measure I does not deny FAIR members equal protection or due process rights." App. A-12. The California Supreme Court denied review on August 20, 1997, without opinion. App. B-1.

REASONS FOR GRANTING THE WRIT

This case raises important federal constitutional issues that have not been, but should be, settled by this Court. Supreme Court Rule 10(c). Petitioners alleged in their Complaint that the amendments to the City's general plan violated their right to equal protection and due process of law, their constitutional right to vote, their right to freedom of religion and privacy laws as more fully set forth below. AA 1-31. These violations will continue unless and until restrained by the courts. Because of the great public importance of these issues, this Court is urged to order review of the lower court decisions denying petitioners relief.

ARGUMENT

I

THIS COURT SHOULD GRANT THE PETITION FOR WRIT OF CERTIORARI TO DECIDE IF ONE CLASS OF PROPERTY OWNERS MAY BE DENIED THE RIGHT GRANTED TO ALL OTHER PROPERTY OWNERS TO CHANGE THE LAND USE DESIGNATION OF THEIR PROPERTY WITHOUT SUBMITTING IT TO THE ELECTORATE

A. Measure I Violates Petitioners' Right to Equal Protection and Due Process of Law

Petitioners alleged that Measure I, in denying the owners of agricultural property the ability possessed by all other property owners to change the designation or use of their property without resorting to the initiative process, deprives petitioners of equal protection of the law and due process of law as guaranteed to them by the Fourteenth Amendment to the United States Constitution. AA 19, Complaint ¶ 48. Petitioners are not challenging the City's right to zone property as "Agricultural Use." Petitioners challenge the requirement that only owners of agriculturally designated property are forced to go through the initiative process to get their property redesignated. AA 18-19, Complaint ¶¶ 46-47.

The Court of Appeal found no denial of equal protection or due process rights in that the need for the long-term protection of agricultural land has been recognized both

by the Legislature and by this Court. "Thus, it is reasonable to single out agricultural land for special treatment that makes it more difficult to change its classification." App. A-12. The Court further found: "That the city council is prohibited from considering other proper legislative planning issues as reasons for changing the agricultural designation of land does not violate due process." App. A-13. This ruling raises a substantial constitutional issue that requires settlement by this Court.

While the police power grants City discretion in enacting general plan and zoning legislation, "[t]he governmental power to interfere by zoning regulations with the general rights of the land owner by restricting the character of his use, is not unlimited ...." ***Nectow v. City of Cambridge***, 277 U.S. 183, 188 (1928). The due process and equal protection clauses are the chief limitations on the exercise of the police power. As this Court held in ***Moore v. City of East Cleveland***, 431 U.S. 494, 507 (1977): "[T]he zoning power is not a license for local communities to enact senseless and arbitrary restrictions ...."

The thrust of ***Moore*** is that a land use ordinance is invalid if it is arbitrary, discriminatory, unreasonable, oppressive, not substantially related to the public health, safety, or welfare, or only marginally serves legitimate purposes while infringing on personal interests protected under due process standards. While the wisdom of a land use ordinance is not a judicial concern, the reasonable relation of the ordinance to the perceived problems is. When a city undertakes intrusive and selective regulation of the otherwise lawful use of property, the usual deference to the legislative body is inappropriate. ***Id.*** at 499. That is the precise issue here with City singling out owners of agricultural property and imposing on them the unique

requirement to obtain redesignation of their property through the initiative process.

This Court addressed the due process requirements of municipal zoning schemes in the seminal land use case of ***Euclid v. Ambler Realty Co.***, 272 U.S. 365 (1926). This Court there held that a property owner can challenge a zoning restriction if the measure is "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." ***Id.*** at 395. If the substantive result of a land use scheme is arbitrary and capricious, bearing no relation to the police power, then the fact that the voters of City enacted it would not salvage the initiative. As this Court held in invalidating a charter amendment enacted by referendum:

> "The sovereignty of the people is itself subject to those constitutional limitations which have been duly adopted and remain unrepealed. Even though Akron might have proceeded by majority vote at town meeting on all municipal legislation, it has instead chosen a more complex system. Having done so, the State may no more disadvantage any particular group ***by making it more difficult to enact legislation in its behalf*** than it may dilute any person's vote or give any group a smaller representation than another of comparable size." ***Hunter v. Erickson***, 393 U.S. 385, 392-93 (1969) (emphasis added).

Here, all property owners other than agricultural property owners are permitted to exercise the privilege of obtaining a redesignation of their property without having to resort to the initiative process. AA 18-19, Complaint ¶¶ 46-48.

This Court held in ***Lucas v. South Carolina Coastal Commission***, 505 U.S. 1003, 1027 n.14 (1992), that

> "a regulation specifically directed to land use no more acquires immunity by plundering landowners generally than does a law specifically directed at religious practice acquire immunity by prohibiting all religions."

There is no rational basis to single out one class of property owners and require them to expend greater time and resources than any other class of property owners in order to receive a redesignation of their property. Petitioners, therefore, seek the remedy set forth in ***Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City***, 473 U.S. 172, 196 (1985):

> "The remedy for a regulation that goes too far, under the due process theory, is not 'just compensation,' but invalidation of the regulation, and if authorized and appropriate, actual damages."

B. Measure I Violates Petitioners' Voting Rights

Petitioners' First Cause of Action alleged that certain members of FAIR, including but not limited to petitioners Williams, Campbell, and Contreras, reside, and are the owners of property designated for agricultural use, outside the City limits but within the area of City's Comprehensive Plan Land Use Plan Map. Measure I prohibits these petitioners from obtaining a redesignation or change of use of their property except through a vote of the public or by meeting other conditions of Measure I which none of these petitioners can meet. Because they are not residents of City, these petitioners were not permitted to vote on the adoption

of Measure I and will not be permitted to vote on any initiative that proposes changes to the agricultural use designation or use of their property. AA 14-15, Complaint ¶¶ 28-34. Petitioners further alleged that City's denial of the right to vote on the designation, redesignation, or change of use of their property is an infringement of the rights of these petitioners to equal protection of the law and due process of law under the Fourteenth Amendment to the United States Constitution. AA 15, Complaint ¶ 34.

Collier v. Menzel, 176 Cal. App. 3d 24, 32 (1985), sets a strict scrutiny standard for denial of voting rights:

> "The right to vote on an equal basis with other citizens is a fundamental right in our democratic society and one of the basic civil rights of man which preserves all other rights. Classifications denying this right deserve the strictest scrutiny. Under this stringent standard, the government must not only demonstrate that it has a compelling public interest in utilizing the classification, it must also show that the classification is necessary to serve its objectives." ***Id.*** (citations omitted).

Here, City cannot survive strict scrutiny because it cannot show that excluding property owners from voting on the land use of their own property is necessary to serve the objectives set forth in its general plan. ***Collier*** neatly summed up petitioners' position, holding that "a governmental entity is not justified in excluding ***otherwise qualified voters*** who have no way of making themselves eligible to vote." ***Id.*** at 33 (emphasis in original).

The Court of Appeal rejected petitioners' claims, relying on ***Holt Civic Club v. Tuscaloosa***, 439 U.S. 60.

App. A-7. In ***Holt***, plaintiffs challenged the validity of an Alabama statute that extended certain limited police powers of cities to adjoining areas. 439 U.S. at 61. A major distinction from the present case is that the ***Holt*** plaintiffs sought an extension of the voting franchise on an "equal footing" with those residing within the city limits. ***Id.*** at 62-63. In other words, the ***Holt*** plaintiffs wanted the right to vote in all city elections, regardless of the subject matter or whether they would be impacted by the election. The relief sought in the present case is much more limited. Petitioners do not seek the right to vote in any City election except those elections concerning the redesignation of property outside the City limits but within the City planning area. AA 14-15, Complaint at 14-15. Unlike the ***Holt*** plaintiffs, FAIR members are seeking the right to vote only on those matters which directly impact them.

Those having a "special interest" in elections have heightened rights of participation. ***Holt*** phrased it in the obverse in declaring: "[A]t least in the context of special interest elections the State may constitutionally disfranchise residents who lack the required special interest in the subject matter of the election." ***Id.*** at 69. Obviously, FAIR members whose land is being voted upon have the required special interest in the election and may not be constitutionally disenfranchised. ***Holt*** observes that the Equal Protection Clause is violated if the challenged classification "'rests on grounds wholly irrelevant to the achievement of the State's objective.'" ***Id.*** at 71. City has never shown why the exclusion of those persons whose property is being voted upon is necessary or relevant to achieve City's objective. ***Holt*** merely found that the limited extension of extraterritorial authority did not require the extension of the franchise to nonresidents on an "equal footing" with residents for all matters, regardless of how attenuated the impact might be on the nonresidents. ***Holt*** did not address the present

situation of the right to vote only in elections concerning the use of one's own property.

Measure I controls land use of substantial parcels of property outside City's territorial limits because Ventura County functions under the Guidelines for Orderly Development (Guidelines). AA 405-408; 13-14. The Guidelines are a written policy, adopted by Ventura County and the cities of the county, that direct that development must occur within the boundaries of cities. The Guidelines prohibit urban uses such as housing, places of worship, schools, etc., from occurring in unincorporated areas. These uses are mandated, as a matter of local planning law, to be placed in the incorporated areas of cities and their spheres of influence. Policy 3 of the Guidelines states that applicants for land use permits or entitlements for urban uses within a city's sphere of influence shall be encouraged to apply to the City to achieve their development goals and shall be discouraged from applying to the County. Policy 4 of the Guidelines states that the City is primarily responsible for local land use planning and for providing municipal services within its sphere of influence. These policies require petitioners whose property is outside City limits but within City's sphere of influence to apply to City for land use permits. ***Id.***

The Court of Appeal, App. A-4-5, acknowledged FAIR's allegation that the Guidelines direct that development must occur within the boundaries of cities and prohibits urban uses such as housing, places of worship, schools, etc., from occurring in unincorporated areas. These uses are mandated to be placed in the incorporated areas of cities and their spheres of influence. The court further acknowledged, App. A-5, that FAIR points out that the Guidelines encourage applicants for permits for urban uses to apply to the City and not to the County. AA 407. The court

erroneously concluded that these allegations merely show that it is the County's policies that control land use in the area outside the City, not Measure I. App. A-5. To the contrary, the allegations show that Measure I applies within City's sphere of influence and that owners of property within the City's planning area, including the sphere of influence, must apply to the City for land use changes.

The court accepted City's argument that the land use designation only becomes effective if the land is ever annexed by City. App. A-4. Under the policies set forth in the Guidelines, ***supra,*** that is incorrect. But even if it were true, the property owner would be faced with a ***fait accompli***, a result in which the owner's rights were determined by other voters in an election from which the party directly interested was barred. Such a system denies the property owners due process and equal protection of the laws.

II

THIS COURT SHOULD GRANT THE PETITION FOR WRIT OF CERTIORARI TO DECIDE IF A CITY MAY SUBJECT A CHURCH'S TEACHINGS TO A POPULAR VOTE

A. Subjecting a Church's Teachings to a Popular Vote Violates the Church's Rights to Freedom of Religion, Privacy, Equal Protection, and Due Process of Law

Petitioners' Second Cause of Action alleged that petitioner First Assembly of God of Ventura (Church) owns approximately 25 acres of property located outside the City limits but presently designated for agricultural use in City's

Comprehensive Plan. AA 16, Complaint ¶ 36. Church submitted an application to City for a comprehensive plan amendment to have said property's land use redesignated so that Church could build a new church and school facility. City notified Church that as a result of the passage of Measure I, unless it can be demonstrated that Church's land is unsuitable for agriculture, among other things, Comprehensive Plan amendments of agricultural use areas are now subject to a vote of the citizens of City. City then informed Church that the option of City Council approval of a Comprehensive Plan amendment would not apply to Church's request and therefore Church would have to place the item on the ballot for action by the voters. AA 16-17, Complaint ¶¶ 37-39.

1. Measure I Denies Church Its Free Exercise of Religion

Church alleges that Measure I violates the First Amendment to the United States Constitution guaranteeing the free exercise of religion. Church alleges that even if an initiative measure redesignating the land use of Church's property qualifies for the ballot, Church is placed in the intolerable position of being subject to a "popularity contest" in which the result of the vote depends not on whether a church and school are an appropriate use for Church's property but whether the electorate approves of Church and its teachings. AA 17, Complaint ¶ 42.

The Court of Appeal characterized these allegations as "not an allegation of fact but a conclusion born of pure speculation." App. A-9. Under California law these allegations were not speculations but allegations of fact. For examples of allegations held to be speculation ***see, e.g., Pillsbury v. Karmgard***, 22 Cal. App. 4th 743, 759 (1994): "Asserting a successor trustee ***could have authorized*** his suit

...." (Emphasis added.) ***Jensen v. Hewlett-Packard Company***, 14 Cal. App. 4th 958, 968 n.6 (1993). "Jensen's counsel speculated that persons ***'may have seen'*** the evaluation...." (Emphasis added.) ***Thor v. Superior Court***, 5 Cal. 4th 725, 745 n.14 (1993), "petitioner asserted that Andrews's actions ***hypothetically threaten security*** ...." (Emphasis added.) In contrast, Church does not allege that the vote ***could, may*** or will ***hypothetically*** depend on whether the electorate approves of the Church or its teaching. Church makes that allegation without conditions. AA 17, Complaint ¶ 42. For purposes of a demurrer, Church's "'ability to prove the allegations, or the possible difficulty in making such proof, does not concern the reviewing court.'" ***People ex rel. Department of Conservation v. Triplett***, 48 Cal. App. 4th 233, 255 (1996). The Court of Appeal erred in labeling such affirmative allegations as speculations.

In ***Employment Division, Department of Human Resources of Oregon v. Smith***, 494 U.S. 872 (1990), Justice O'Connor's quote from ***West Virginia State Board of Education v. Barnette***, 319 U.S. 624, 638 (1943), illuminates what is at issue here:

> "'The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to ... freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.'" ***Employment Division***, 494 U.S. at 903 (O'Connor, J., concurring).

In violation of this fundamental principle, Measure I submits the fundamental rights of the Church to build its church edifice and school to a public vote on the Church and its teachings. A less restrictive means is available in allowing Church to make its application for redesignation of its property to the City Council.[2]

2. **Measure I Denies Church Its Right to Privacy**

Church also alleged that Measure I violates its right to privacy. AA 17-18, Complaint ¶ 42. Specifically, Church alleged that Measure I places it in the intolerable position of being subject to a "popularity contest" in which the result of the vote depends not on whether a church and school is an appropriate use for its property but rather whether the electorate approves of Church and its teachings. ***Id.*** This Court observed in ***Thornburgh v. American College of Obstetricians and Gynecologists***, 476 U.S. 747, 772 (1986), "Our cases long have recognized that the Constitution embodies a promise that a certain private sphere of individual liberty will be kept largely beyond the reach of government."

United States Department of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749, 764,

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[2] The state regularly exempts religious objectors from laws of general applicability. ***People v. Woody***, 61 Cal. 2d 716, 723-27 (1964), held that Indians who ingest peyote for religious purposes are exempt from California criminal drug laws. Health and Safety Code § 123420(a) exempts doctors and nurses from performing abortions if their opposition is based on religious grounds. Health and Safety Code § 120365 exempts public school students from immunization requirement if their opposition is based on religious grounds.

n.15 (1989), cited Warren & Brandeis, ***The Right to Privacy***, 4 Harv. L. Rev. 193, 198 (1890-1891), for this basic principle: "'The common law secures to each individual the right of determining, ordinarily, to what extent his thoughts, sentiments, and emotions shall be communicated to others.... [E]ven if he has chosen to give them expression, he generally retains the power to fix the limits of the publicity which shall be given them.'"

The Court quoted several authorities on the nature of the privacy right. A. Breckenridge, ***The Right to Privacy*** 1 (1970), "'Privacy, in my view, is the rightful claim of the individual to determine the extent to which he wishes to share of himself with others.... It is also the individual's right to control dissemination of information about himself'"; A. Westin, ***Privacy and Freedom*** 7 (1967), "'Privacy is the claim of individuals ... to determine for themselves when, how, and to what extent information about them is communicated to others'"; Project, Government Information and the Rights of Citizens, 73 Mich.L.Rev. 971, 1225 (1974-1975), "'[T]he right of privacy is the right to control the flow of information concerning the details of one's individuality.'" ***Reporters Committee***, 489 U.S. at 764.

That this right of privacy is not limited to individuals was made plain in ***Brown v. Socialist Workers '74 Campaign Committee (Ohio)***, 459 U.S. 87, 91 (1982): "'Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs.'" The Court there held: "The right to privacy in one's political associations and beliefs will yield only to a 'subordinating interest of the State [that is] compelling,' and then only if there is a 'substantial relation between the information sought and [an] overriding and compelling state interest.'" ***Id.*** at 91-92.

To similar effect, the right to privacy in one's religious associations and beliefs may be forced to yield only where there is a substantial relation between information on the Church's teachings and an overriding, compelling state interest. City has never shown a compelling state interest in requiring Church to submit its teachings to a popular vote.

3. **Measure I Denies Church Equal Protection**

Church alleged that the requirement that Church submit its application for land use redesignation to a vote of the people violated Church's right to equal protection and due process of law. AA 17-18, Complaint ¶ 42. As a tax-exempt organization under federal law, Church is prohibited from "electioneering," including the gathering of signatures for an initiative and campaigning for the initiative if it qualifies for the ballot. ***Id.*** at 17, Complaint ¶ 41. Federal law denies tax-exempt status to any nonprofit organization that devotes a "substantial" part of its activities toward attempting to influence legislation, including initiatives. Internal Revenue Code § 501(c)(3).

It costs the Church nothing to request the City Council to redesignate the land use of its property. (And indeed, Church has already made such a request, albeit unsuccessfully, AA 16-17, Complaint ¶¶ 37-39.) On the other hand, if Church is forced to mount a campaign to collect signatures for a ballot initiative and pay for the political advertising--whether in newspapers or electronic media--necessary to ensure the success of the initiative, this will be a far more expensive undertaking and will make the Church susceptible to a finding that this political "electioneering" constituted a "substantial" part of its activities. This is prohibited by federal law, ***id.*** at 17, Complaint ¶ 41, specifically by Internal Revenue

Code § 501(c)(3), and would cause Church to forfeit its tax-exempt status. ***Christian Echoes National Ministry, Inc. v. United States***, 470 F.2d 849, 856-58 (10th Cir. 1972).

The Internal Revenue Code allows certain charities to substitute objective limits on political expenditures by electing to be governed by Internal Revenue Code § 501(h). However, this election is not available to churches or other religious organizations. IRC § 501(h)(5). Thus, only charitable organizations run the risk of revocation of their tax-exempt status because of such political participation, and only religious charitable organizations such as Church are unable to protect themselves from such revocation through the election available to other charities under Internal Revenue Code § 501(h). And this deprivation of tax-exempt status may be applied retroactively. ***Christian Echoes***, 470 F.2d at 858.

Church is not challenging the constitutionality of the tax laws. What Church is challenging is Measure I's denial to Church of equal protection of the law in placing it and other religious organizations in a dilemma faced by no other person or entity wishing to redesignate property. Church must either risk its tax-exempt status or forego the right available to every entity except religious ones to mount a vigorous campaign for an initiative to redesignate the land use of its property. This is the essence of denial of equal protection and due process of law.

In ***City of Boerne v. Flores***, __ U.S. __, 117 S.Ct. 2157, 2161 (1997), this Court observed that neutral, generally applicable laws have failed to pass muster when other constitutional protections were at stake. The example given, ***id.***, was ***State of Wisconsin v. Yoder***, 406 U.S. 205 (1972), which invalidated Wisconsin's mandatory school-attendance law as applied to Amish parents who refused on

religious grounds to send their children to school. "That case implicated not only the right to the free exercise of religion but also the right of parents to control their children's education." ***City of Boerne***, 117 S.Ct at 2161. This case implicates not only the free exercise of religion but also the constitutional protections of privacy, equal protection and due process of law. Measure I, in violating Church's rights under each of those protections, fails to pass constitutional muster.

CONCLUSION

For the reasons set forth above, and because of the fundamental constitutional rights at stake, it is respectfully urged that this Court grant this Petition for Writ of Certiorari.

DATED: November 16, 1997.

Respectfully submitted,
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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SIX

COURT OF APPEAL
SECOND DIST.

FILED
JUNE 9, 1997
JOSEPH A. LANE, Clerk

FAIR, etc., et al.,	)	2d Civil No. B105879
	)	
Plaintiffs and Appellants,	)	(Super. Ct.
	)	No. CIV 162842)
v.	)	(Ventura County)
	)	
CITY OF SAN BUENAVENTURA, etc., et al.,	)	
	)	
	)	
Defendants and Respondents.	)	
	)	

This is an action for writ of mandate, injunction and declaratory relief challenging Measure I, a land use initiative passed by the voters of the City of San Buenaventura (hereinafter "City"). The measure, which amends the City's general plan, provides with certain exceptions that lands designated for agricultural use may not be redesignated for other uses without a vote of the City's electorate until 2030.

Measure I is patterned after a similar measure that survived scrutiny by our Supreme Court in *DeVita v. County of Napa* (1995) 9 Cal.4th 763. In *DeVita*, however, the court considered only the validity of a general plan amendment by initiative, the validity of the 30-year term of the measure and the voter approval provisions. The complaint here raises other issues.

Nevertheless, we agree with the trial court that the complaint fails to state a cause of action. We affirm that judgment entered pursuant to the sustaining of the City's demurrer.

FACTS

The voters of the City approved Measure I at the general election on November 7, 1995. The purpose of the measure was to preserve agricultural and other open space lands within the City's planning area. The measure readopted until December 31, 2030, the City's agricultural use designations as defined in the City's comprehensive plan and as set forth on the City's land use plan map of August 28, 1989, as amended through February 1, 1995. Some of the land within the City's planning area lies outside the City boundaries in unincorporated areas of the County of Ventura (hereinafter "County").

Measure I provides, with certain exceptions, that the designation of lands for agricultural use shall not be amended prior to December 31, 2030, unless the amendment is approved by a vote of the people. The exceptions allow the city council to amend the agricultural designation where the land is useless for agriculture or the designation for agricultural use would constitute an unconstitutional taking.

FAIR, an unincorporated association of residents and property owners in the County, filed this action. FAIR is an acronym for Farmers, Families and Friends Against Irresponsible Regulations. Some members of FAIR are residents of the City; some reside elsewhere in the County; and some reside outside the County. Most of the parcels owned by FAIR members are outside the City but within the City's planning area. All are designated for agricultural use under Measure I. The complaint requested that the court declare Measure I to be void and restrain the City from enforcing it.

The City demurred on the ground that the complaint failed to state a cause of action. At the hearing on the demurrer, FAIR's counsel stated the complaint was a facial attack on Measure I. The trial court asked whether if it sustained the demurrer FAIR could amend any allegation to state a good cause of action. FAIR did not request an opportunity to amend. The trial court sustained the demurrer without leave to amend.

DISCUSSION

We treat the demurrer as admitting all facts properly pleaded, but not contentions, deductions or conclusions of fact or law. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) We give the complaint a reasonable interpretation in determining whether it states facts sufficient to constitute a cause of action. (*Ibid.*) We take FAIR's failure to request leave to amend as a concession that an amendment would not be helpful.

I

The first cause of action alleged that Measure I violates voting and equal protection rights of those plaintiffs residing outside the City's boundaries but within the City's planning area. FAIR complains that landowners who reside outside the City were not permitted to vote on Measure I and will not be permitted to vote on any proposed change to the agricultural designation of their properties.

It is well settled that although residents have a constitutional right to vote in municipal elections, nonresident landowners have no such right. (*Curtis v. Board of Supervisors* (1972) 7 Cal.3d 942, 962-963.) FAIR's first cause of action seems not so much concerned, however, with nonresident landowners who own land within the City, but with nonresident landowners who own land outside the City but within the City's planning area. Some of this land is designated for agricultural use in the City's general plan and map that are part of Measure I.

Government Code section 65300 requires each city to adopt a general plan for the physical development of the city "and of any land outside its boundaries which in the planning agency's judgment bears relation to its planning." FAIR's complaint does not allege that the City's general plan readopted by Measure I touches land that bears no relation to the City's planning. Thus, on its face, Measure I does no more than follow the mandate of the Government Code in planning for the use of land outside its current boundaries.

FAIR argues that although the Government Code authorizes the City to plan for land use outside its boundaries, no law authorizes the City to actually regulate

land use outside its boundaries. The City concedes as much. It says that the use designation for land located outside the City is simply a preplanning tool that only becomes effective if the land is ever annexed by the City.

In an effort to show that Measure I actually regulates land outside the City's boundaries, FAIR points to an allegation in its complaint that: "Ventura County functions under the Guidelines for Orderly Development and other land use policies that direct that development must occur within the boundaries of cites [*sic*]. These policies prohibit urban uses such as housing, places of worship, schools, etc., from occurring in unincorporated areas. These uses are mandated, as a matter of local planning law, to be placed in the incorporated areas of cities and their spheres of influence." FAIR also points out that the guidelines for Orderly Development encourage applicants for permits for urban uses to apply to the City and not to the County.

But FAIR's allegation does nothing more than show it is the County's policies that control land use in the area outside the City, not Measure I. Should the County decide to change its policies and allow urban development on agricultural lands outside the City, there is nothing in Measure I to prevent it.

In *Holt Civic Club v. Tuscaloosa* (1978) 439 U.S. 60 [58 L.Ed.2d 292], the Supreme Court discussed extraterritorial statutes and the voting rights of nonresidents. There the court upheld the constitutionality of Alabama's "police jurisdiction" statutes against an equal protection and due process challenge. Those statutes subjected persons residing within up to three miles of a city's limits to the city's police and sanitary regulations and the city's business

licensing powers and gave the municipal courts jurisdiction over prosecutions for breach of a city's ordinances within its police jurisdiction. Persons residing within a police jurisdiction, however, could not vote in the city's elections.

Residents of a police jurisdiction argued the statutes denied them equal protection and due process because they could not vote in the city's elections. In rejecting the argument, the court stated, "[O]ur cases have uniformly recognized that a government unit may legitimately restrict the right to participate in its political process to those who reside within its borders." (*Holt Civic Club v. Tuscaloosa, supra*, 439 U.S. at pp. 68-69 [58 L.Ed.2d at p. 301].)

The court distinguished in a footnote, however, "a situation in which a city has annexed outlying territory in all but name, and is exercising precisely the same governmental powers over residents of surrounding unincorporated territory as it does over those residing within its corporate limits." (*Holt Civic Club v. Tuscaloosa, supra*, 439 U.S. at pp. 72-73, fn. 8 [58 L.Ed.2d at pp. 303-304, fn. 8].) The court stated appellants have neither alleged nor proven that the authority exercised by the city within the police jurisdiction is the same as exercised by the city within its corporate limits. The court said that the appellants' list of the city's extraterritorial powers is notable for what it does not include: "the vital and traditional authorities of cities and towns to levy ad valorem taxes, invoke the power of eminent domain, and zone property for various types of uses." (*Ibid.*)

Here the complaint cannot reasonably be construed as alleging that the City exercises "precisely the same governmental powers over residents of surrounding unincorporated territory as it does over those residing within

its corporate limits." (*Holt Civic Club v. Tuscaloosa, supra*, 439 U.S. at pp. 72-73, fn, 8 [58 L.Ed.2d at pp. 303-304, fn. 8].) Measure I has even less effect outside the City's limits than the statutes upheld in *Holt*. Unlike the statutes upheld in *Holt*, Measure I has no actual regulatory effect in the unincorporated areas of the County.

Nevertheless, FAIR tries to distinguish *Holt* by pointing to the court's statement that Tuscaloosa did not have the power to zone property in the police jurisdiction area. But the court pointed to the lack of zoning power simply as one factor showing that the police jurisdiction statutes were not the equivalent of a de facto annexation of territory. The court did not suggest that the power to zone land outside the city limits would by itself constitute a de facto annexation, and, in any event, Measure I does not provide the City with that power.

Nor is Measure I subject to strict scrutiny which places the burden on the City to show that a compelling interest justifies the measure. The court in *Holt* stated, "Our inquiry is limited to the question whether 'any state of facts reasonably may be conceived to justify' Alabama's system of police jurisdictions . . . ." (*Holt Civic Club v. Tuscaloosa, supra*, 439 U.S. at p. 74 [58 L.Ed.2d at p. 304].) "[T]he burden was on appellants to establish a difference in treatment violative of the Equal Protection Clause . . . ." (*Id.*, at p. 72-73, fn. 8 [58 L.Ed.2d at pp. 303-304, fn. 8].) Thus, the court did not apply strict scrutiny to the police jurisdiction statutes in question.

FAIR's reliance on *Hawn v. County of Ventura* (1977) 73 Cal.App.3d 1009 is misplaced. There the court subjected to strict scrutiny a measure that would require the approval

of a city's voters before the county could place an airport within the city. The court held the measure could not survive strict scrutiny because the city's proffered environmental justification was not compelling enough to overcome allowing city voters to "dump" airport problems on disenfranchised county voters.

II

Hawn was decided before *Holt* and may well have been decided differently had the Court of Appeal had *Holt* to guide it. In any event, here, unlike *Hawn*, Measure I does not allow City voters to "dump" anything on the County. Measure I does not prevent the County from designating land in unincorporated areas for whatever use the County deems desirable.

The second cause of action alleged that Measure I violates the rights of freedom of religion, privacy, equal protection and due process of the First Assembly of God of Ventura.

The First Assembly of God (hereinafter "Church") is a church that owns land outside the City's limits. The land is designated agricultural on the City's land use plan map. The church applied to the City for a land use plan amendment to allow the Church to build a new church and school facility. The City informed the Church that it would have to place the item on the ballot for action by the voters.

The Church alleges that Measure I places it in the intolerable position of being subject to a popularity contest. It believes the result of the vote will depend not on whether a church and school is an appropriate use of the land, but on

whether the electorate approves of the Church and its teachings. Thus, the Church concludes Measure I violates the free exercise of religion guaranteed by the United States and California Constitutions. (U.S. Const., 1st Amend.; Cal. Const., art. I, § 4.)

The allegation that Measure I subjects the Church's teachings to popular referendum is not an allegation of fact but a conclusion born of pure speculation. Unlike allegations of fact, we are not bound on demurrer to treat such conclusions as true. (*Blank v. Kirwin, supra,* 39 Cal.3d 311, 318.) The allegation is belied by the terms of Measure I. The measure calls for nothing other than a vote on a land use designation. It does not call for a vote on anyone's religious beliefs. It does not infringe in any respect on the free exercise of the Church's religion.

The Church's reference to the Religious Freedom Restoration Act (RFRA) (42 U.S.C. § 2000bb et seq.) is not helpful. The RFRA provides that "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section." (42 U.S.C. § 2000bb-1(a).) Under subsection (b), "[g]overnment may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person--[¶] (1) is in furtherance of a compelling governmental interest; and [¶] (2) is the least restrictive means of furthering that compelling governmental interest." (42 U.S.C. § 2000bb-1(b).)

Our Supreme Court in *Smith v. Fair Employment & Housing Com.* (1996) 12 Cal.4th 1143, 1166 described the circumstances under which the RFRA requires the

government to show a compelling interest and use the least restrictive means: "The burden [of a neutral, generally applicable law] must fall on a religious belief rather than on a philosophy or a way of life. (2) The burdened religious belief must be sincerely held. (3) The plaintiff must prove the burden is substantial or, in other words, legally significant. [Fns. omitted.]"

Here, Measure I places no burden on any religious belief. It simply calls for a vote on a land use designation. Moreover, the Church's suggestion that land use decisions for its property be left to the city council is difficult to understand. If the Church is concerned that the voters' decisions about land use may be affected by the Church's religious beliefs, it is difficult to see why the concern does not apply with equal force to the city council.

The Church's argument that Measure I violates Church members' right of privacy is also without merit. The contention is based on the theory that Measure I puts the Church's religious beliefs to a popular vote. The theory is without foundation. Nor does Measure I compel the Church to engage in any political activity. The decision whether to pursue a change in the land use designation is entirely up to the Church.

Nor is there merit to the Church's argument that Measure I denies it equal protection of the law. The Church's equal protection challenge is based on its tax exempt status as a nonprofit organization. The Church points out the Internal Revenue Code denies tax exempt status to a nonprofit organization that devotes a substantial part of its activities toward attempting to influence legislation. (26 U.S.C. § 501(c)(3).) The Church also

points out that, unlike other charitable organizations, a religious institution may not take advantage of an election under Internal Revenue Code section 501(h) that may help insulate it from the charge that its political activities are substantial.

The Church claims it costs it nothing to request the city council to redesignate the land use of its property. If, however, the Church is forced to collect signatures for a ballot initiative and pay for political advertising, the Church claims that its actions may be found to constitute a substantial part of its activities. The Church concludes Measure I denies it equal protection because only charitable organizations run the risk of loss of their tax exempt status and only religious organizations are unable to avail themselves of an election under Internal Revenue Code. (26 U.S.C. § 501(h).)

But the Church cites no authority that requires a city to formulate land use planning policies with an eye toward the tax status of individual landowners. If the Church believes the tax laws leave it at a disadvantage, its argument is with the tax laws, not Measure I.

III

The third cause of action alleged that Measure I violates the due process and equal protection rights of FAIR members. FAIR points out that only owners of agriculturally designated property are forced to go through the initiative process to get their property redesignated. FAIR contends the disparate treatment of agricultural land is without rational basis.

The equal protection clause does not require uniform treatment. (*Norsco Enterprises v. City of Fremont* (1976) 54 Cal. App.3d 488, 498.) Classification of land is allowed if the classification is reasonable. (*Ibid.*) Wide discretion is allowed in making the classification, and every presumption is in favor of its validity. (*Ibid.*) The classification is reasonable if any set of facts can be conceived that would sustain it. (*Ibid.*)

Our Supreme Court stated in *DeVita v. County of Napa, supra*, 9 Cal.4th 763, 791, "[T]he particular need for the long-term protection of agricultural land has been recognized both by the Legislature and by this court." Thus, it is reasonable to single out agricultural land for special treatment that makes it more difficult to change its classification. Measure I does not deny FAIR members equal protection or due process rights.

FAIR complains that the findings required by Measure I in order to allow the city council to change the land use designation from agricultural are arbitrarily restrictive. FAIR points to the requirement of Measure I that the city council must find that the land is "unsuitable for any form of agriculture" before the council can redesignate the land use without a popular vote. FAIR claims the required finding "unsuitable for any form of agriculture" excludes every parcel currently designated as agricultural from redesignation by the city council. FAIR states that the required finding does not address other proper reasons for changing agricultural uses and prohibits the city council from balancing different planning interests.

The exception to the popular vote requirement is not arbitrarily restrictive. The exception is narrowly drawn to

ensure that any redesignation will be by popular vote except where the need for redesignation is quite obvious. That the city council is prohibited from considering other proper legislative planning issues as reasons for changing the agricultural designation of land does not violate due process.

The people have the right to reserve such planning issues for their direct decision. In upholding the constitutionality of a land use referendum in *Eastlake v. Forest City Enterprises, Inc.* (1976) 426 U.S. 668, 672 [49 L.Ed.2d 132,137], the Supreme Court stated: "Under our constitutional assumptions, all power derives from the people, who can delegate it to representative instruments which they create. . . . In establishing legislative bodies, the people can reserve to themselves power to deal directly with matters which might otherwise by [*sic*] assigned to the legislature. [Citation.]"

IV

FAIR contends in its fourth cause of action that Measure I's extraterritorial effect violates article XI, section 7 of the California Constitution. That section provides: "A county or city may make and enforce within its limits all local police, sanitary, and other ordinances and regulations not in conflict with general laws." FAIR cites *Birkenfeld v. City of Berkeley* (1976) 17 Cal.3d 129, 140 for the proposition that a city's police power can be applied only within its own territory.

But as we have previously stated, Measure I does not purport to apply any police power outside of the City's limits. As applied to land outside the City's limits, it is merely a preplanning tool without legal effect. Such

preplanning for land within a city's zone of influence is mandated by Government Code section 65300 and has been upheld against an attack that it violates article XI, section 7. (City of Irvine v. Irvine Citizens Against Overdevelopment (1994) 25 Cal.App.4th 868, 876-877.) If Measure I has any actual effect outside the City, it is only because County policies give it effect.

V

FAIR alleged in its fifth cause of action that Measure I violated the requirement of Government Code section 65300.5. That section requires that the general plan and its elements to be internally consistent.

FAIR points to that portion of Measure I which states, "The provisions of this initiative shall prevail over any revisions to the City of Ventura's Comprehensive Plan as amended through February 1, 1995, or to the City of Ventura's Land Use Plan Map as amended through February 1, 1995, which conflict with the initiative." FAIR also points to another portion of Measure I which requires the city council to complete such revisions of the comprehensive plan within 180 days "as are necessary to achieve consistency with all provisions of this initiative."

FAIR claims that such a "precedence clause" was ruled unlawful in *Sierra Club v. Board of Supervisors* (1981) 126 Cal.App.3d 698. But FAIR's complaint alleges no actual inconsistency in the City's comprehensive plan. Thus, there is nothing that brings any "precedence clause" into play. In the absence of some allegation of actual conflict, the question of the validity of the clause is purely hypothetical. Courts are not required to decide such

hypothetical questions. (See 3 Witkin, Cal. Procedure, *supra*, § 75, pp. 135-138.)

VI

FAIR alleges in its sixth cause of action that Measure I is an advisory resolution rather than a legislative act. The allegation is based on the portion of Measure I that requires the city council within 180 days to complete such revisions of the comprehensive plan "as are necessary to achieve consistency with this initiative."

The electorate's initiative power is limited to legislation; a resolution is not within the electorate's initiative power. (*American Federation of Labor v. Eu* (1984) 36 Cal.3d 687, 714; *Marblehead v. City of San Clemente* (1991) 226 Cal.App.3d 1504, 1510.) Here FAIR does not contest that a general plan amendment is legislative in nature. Nor can FAIR validly contest that Measure I directly amends the general plan. Thus, this case is not like *Marblehead* where the initiative measure did not directly amend the general plan. In *Marblehead* the measure only declared that the general plan should be revised to reflect the "concepts" expressed in the measure. The actual amendment was left to the city council. (*Marblehead v. City of San Clemente, supra*, 226 Cal.App.3d at p. 1510.)

Measure I requires the city council to amend the general plan only if it is necessary to achieve consistency with the initiative. Even if this provision of the measure could somehow be construed as coming within the proscription announced in *Marblehead*, FAIR would not be helped. FAIR's complaint does not allege that any such amendment was made or was required to be made under the

terms of Measure I. FAIR's sixth cause of action at best alleges a hypothetical question. (See 3 Witkin, Cal. Procedure, *supra*, Actions, § 75, pp. 135-138.)

VII

FAIR's seventh cause of action alleges that Measure I prohibits the building of adequate additional housing to accommodate the increasing population of the City and the region. Thus, FAIR alleges Measure I violates the policy of providing adequate and affordable housing set forth in the Government Code. (Citing Gov. Code, § 65009, subd. (a) [declaring a housing crises in California]; § 65302, subd. (a) [requiring a general plan to contain a land use element that includes housing]; § 65580 [declaring the availability of housing to be of vital statewide importance]; § 65913 [declaring a severe shortage of affordable housing].)

First, Measure I does not prohibit any property from being designated for residential use; it merely requires a vote of the electorate to do it.

Second, FAIR points to no law requiring the City to satisfy its need for housing from land designated for agricultural use.

Third, FAIR's allegations ignore the Legislature's policies in favor of preserving agricultural land. (See Gov. Code, § 52100 et seq. [authorizing 10-year contracts between local government and agricultural landowners to preserve agricultural use in exchange for lower property taxes]) and open space (see Gov. Code, § 65302, subd. (e) [requiring general plan to contain an open-space element]; § 65561, subd. (a) [declaring open space necessary to insure the

availability of land for the production of food and fiber]; § 65562 [declaring open space a valuable resource that must be preserved whenever possible].)

Fourth, FAIR does not allege that the current housing element of the City's general plan is inadequate. FAIR's concern appears to be that Measure I might at some time in the future cause the housing element to become inadequate. The court in *DeVita v. County of Napa, supra*, 9 Cal.4th 763, 792-793 rejected such concerns as a basis for invalidating a similar initiative measure. The court stated: "We should not presume--nor, given the rule that doubts should be resolved in favor of the initiative and referendum power, should we assume the Legislature presumed--that the electorate will fail to do the legally proper thing. We see no reason to suppose that, if Measure J at some point causes the Napa County General Plan to become inadequate--a scenario that is by no means inevitable--the electorate will not approve a proper corrective amendment proposed by the board. If, down the road, the electorate fails to act appropriately, courts may then be asked to intervene to remedy deficiencies in the general plan, as they would likely act if the board itself failed to properly revise the general plan."

FAIR's reliance on *Stocks v. City of Irvine* (1981) 114 Cal.app.3d 520 is misplaced. There the court held that plaintiffs who resided outside the city had standing to bring an action challenging the city's alleged exclusionary zoning. Here FAIR's problem is not standing. Its problem is that, apart from standing, the allegations of its complaint fail to state a cause of action.

VIII

The eighth cause of action is for declaratory relief. It is based on the previous seven causes of action. Having concluded that the previous seven causes of action on which it is based are insufficient, it follows that the eighth is also.

The judgment is affirmed. Costs are awarded to respondents.

NOT TO BE PUBLISHED.

GILBERT, J.

We concur:

STONE, P. J.

YEGAN, J.

John J. Hunter, Judge
Superior Court County of Ventura

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Amy A. Albano, City Attorney, Daniel P. Selmi, Shute, Mihaly & Weinberger, Rachel B. Hooper and Robert S. Perlmutter for Defendants and Respondents.

Second Appellate District, Division Six,

No. B105879

IN THE SUPREME COURT OF CALIFORNIA

SUPREME COURT
FILED
AUG 20 1997

Robert Wandruff Clerk

FAIR, Etc., Et Al., Appellants

v.

CITY OF SAN BUENAVENTURA,
Etc. Et Al., Respondents

Petition for review DENIED.

GEORGE
Chief Justice

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VENTURA COUNTY
SUPERIOR AND MUNICIPAL COURTS

FILED
JUL 31, 1996

Sheila Gonzalez, Superior and
Municipal Courts Executive
Officer and Clerk

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF VENTURA

FAIR, an unincorporated association; FIRST ASSEMBLY OF GOD OF VENTURA, a church; JAMES W. WILLIAMS, III, an individual; JAMES M. SHARP, an individual; R. H. SMITH FAMILY PARTNERSHIP, a family partnership; LEAVENS RANCHES, a family partnership; ROBERT TOBIAS and STEVEN TOBIAS, individuals; J.D. McGRATH FARMS, a family partnership; HOWARD AND HOWARD RANCH; DANIEL CAMPBELL, an individual; ITO FARMS, a corporation; THE CONTRERAS FAMILY, individuals; and HIJI BROS., a partnership, Petitioners and Plaintiffs, vs. CITY OF SAN BUENAVENTURA, a political subdivision; and the CITY OF SAN BUENAVENTURA CITY COUNCIL, Respondents and Defendants.	Case No. Civ 162842 ORDER SUSTAINING RESPONDENTS' DEMURRER

On July 16, 1996, respondents and defendants CITY OF SAN BUENAVENTURA and CITY OF SAN BUENAVENTURA CITY COUNCIL's (collectively, the "City") demurrer to petitioners and plaintiffs' ("petitioners") petition and complaint came before this court for hearing. The parties having appeared through counsel, the court having reviewed the pleadings and documents on file and heard the argument of counsel and being fully apprised therein,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that:

1. The City's demurrer to petitioners' first cause of action is sustained without leave to amend because petitioners have failed to allege facts sufficient to show a violation of their voting rights. Cities may legitimately restrict participation in municipal elections to city residents. (Holt Civic Club v. Tuscaloosa (1978) 439 U.S. 60, 68-69; Collier v. Menzel (1985) 176 Cal.App.3d 24, 33.) Petitioners have not alleged, and cannot allege, facts with respect to Measure I sufficient to require extending the right to vote in city elections to non-city residents.

2. The City's demurrer to the second cause of action is sustained without leave to amend because petitioner First Assembly of God of Ventura ("Church") has failed to allege facts sufficient to show a violation of its rights to equal protection, free exercise of religion, and privacy. Church cannot allege facts sufficient to show a violation of its right to free exercise of religion because Measure I is a "valid and neutral law of general applicability." (See Employment Division v. Smith (1990) 494 U.S. 872, 879; Smith v. Fair Employment and Housing Comm'n (1996) 12 Cal.4th 1143, 1161-62.) Church has not alleged, and cannot allege, facts showing that, with respect to Measure I, church has been treated differently than any other landowner subject to the City's General Plan and thus, it cannot state a claim for violation of its equal protection rights. Finally, Church cannot state facts sufficient to show a violation of its privacy rights because Measure

I does not intrude into "private areas of individual lives." (City of Los Altos v. Barnes (1992) 3 Cal.App.4th 1193, 1201.)

3. The City's demurrer to petitioners' third cause of action is sustained without leave to amend because petitioners fail to allege facts sufficient to show a violation of their equal protection and due process rights. Planning and zoning routinely impose different requirements upon different categories of land. (See e.g., Studen v. Beebe (6th Cir. 1978) 588 F.3d 560, 565.) Petitioners have not alleged, and cannot allege, that Measure I's special treatment of agricultural land within its planning area is irrational or fails to advance a legitimate governmental interest. (See Kawaoka v. City of Arroyo Grande (9th Cir. 1994) 17 F.3d 1227, 1234.)

4. The City's demurrer to petitioners' fourth cause of action is sustained without leave to amend because petitioners have failed to allege facts showing that the City has exceeded its police power under the California Constitution. Petitioners have not alleged, and cannot allege, facts sufficient to support this cause of action because cities may constitutionally plan for areas outside their boundaries. (City of Irvine v. Irvine Citizens Against Overdevelopment (1994) 25 Cal.App.4th 868, 877; Dateline Builders, Inc. v. City of Santa Rosa (1983) 146 Cal.App.3d 520, 531.) Thus, Measure I does not exceed the City's police power.

5. The City's demurrer to petitioners' fifth cause of action is sustained without leave to amend because petitioners have failed to allege facts sufficient to show that Measure I contains an illegal "precedence clause" under Sierra Club v. Kern County Bd. of Supervisors (1981) 126 Cal.App.3d 698. Petitioners' challenge to Measure I's statement that its provisions "prevail over" any amendments to the City's General Plan made between February 1, 1995 and December 7, 1995 (the measure's effective date) is without merit because petitioners have not alleged, and cannot allege, such plan amendments occurred during that time period.

6. The City's demurrer to petitioners' sixth cause of action is sustained without leave to amend because petitioners have failed to

allege facts sufficient to show that Measure I is an illegal advisory measure. Unlike the measure challenged in Marblehead v. City of San Clemente (1991) 226 Cal.App.3d 1504, on which petitioners rely, Measure I directly amends the City's General Plan, specifying both the precise language to be added and the precise location of the amendment within the existing General Plan. Measure I's mechanism for amending the City's General Plan is identical to the approach of Napa County's Measure J, upheld in DeVita v. Napa County (1995) 9 Cal.4th 763.

7. The City's demurrer to petitioners' seventh cause of action is sustained without leave to amend because petitioners have failed to allege facts sufficient to show that Measure I conflicts with state housing law. Petitioners have failed to allege facts sufficient to show that Measure I has caused the City's housing element to fall into noncompliance with state law. Indeed, petitioners cannot allege such facts because Measure I does not amend the City's housing element or reduce the amount of housing available within the City.

8. The City's demurrer to petitioners' eighth cause of action is sustained without leave to amend because petitioners cannot state a cause of action for declaratory relief. Since this cause of action is based upon the allegations of the preceding seven claims and each of those claims fails to state a cause of action for relief, the eighth cause of action fails.

DATED: July 25, 1996.

JOHN J. HUNTER
JUDGE OF THE SUPERIOR COURT

STATUTORY PROVISIONS AT ISSUE

Internal Revenue Code (26 U.S.C.) § 501(c)(3) provides in pertinent part:

"(c) List of exempt organizations.--The following organizations are referred to in subsection (a):

"(3) Corporations ... organized and operated exclusively for religious ... purposes ... no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation (except as otherwise provided in subsection (h)), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office."

Internal Revenue Code (26 U.S.C.) § 501(h) provides in pertinent part:

"(h) Expenditures by public charities to influence legislation.--

"(1) General rule.--In the case of an organization to which this subsection applies, exemption from taxation under subsection (a) shall be denied because a substantial part of the activities of such organization consists of carrying on propaganda, or otherwise attempting, to influence legislation, but only if such organization normally--

"(A) makes lobbying expenditures in excess of the lobbying ceiling amount for such organization for each taxable year, or

"(B) makes grass roots expenditures in excess of the grass roots ceiling amount for such organization for each taxable year.

....

"(3) Organizations to which this subsection applies.--This subsection shall apply to any organization which has elected (in such manner and at such time as the Secretary may prescribe) to have the provisions of this subsection apply to such organization and which, for the taxable year which includes the date the election is made, is described in subsection (c)(3) and--

"(A) is described in paragraph (4), and

"(B) is not a disqualified organization under paragraph (5).

....

"(5) Disqualified organizations.--For purposes of paragraph (3) an organization is a disqualified organization if it is--

"(A) described in section 170(b)(1)(A)(i) (relating to churches)."